89-1228

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1989

LOCAL 54, HOTEL EMPLOYEES & RESTAURANT EMPLOYEES INTERNATIONAL UNION, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Should not the Court grant the writ and decide this case because the decision of the Court below conflicts with federal labor policy, in that said decision: (a) defeats the language and purposes of the proviso of §8(b)(1)(A) of the National Labor Relations Act, as amended, concerning the right of a "labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein," (b) destroys the distinction between union and agency shops, (c) renders null and void the collectively bargained union security clause, and (d) critically weakens the ability of a labor organization to fulfill its obligations as bargaining agent?

2. Should not the Court grant the writ and decide this case because the Court below has erroneously decided an important question of federal labor law concerning union membership and the rights and obligations arising from such membership which has not been, but should be, settled by this Court, and which has serious consequences to labor unions and their members?

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No.

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Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Local 54, Hotel Employees & Restaurant Employees International Union, AFL-CIO, petitions for a Writ of Certiorari to review a Judgment of the United States Court of Appeals for the Third Circuit, entered on October 5, 1989.

OPINIONS BELOW

The Decision and Order of the Administrative Law Judge of the National Labor Relations Board (A 22-28)[1]

1. References herein to "A" pages are to the Appendix to this Petition.

is officially reported at 291 NLRB No. 140. The Decision and Order of the National Labor Relations Board (A 17-21), which affirmed the ruling of the Administrative Law Judge, is reported at 291 NLRB No. 140. The Opinion of the United States Court of Appeals for the Third Circuit (A 2-16), which enforced the Order of the National Labor Relations Board, is reported at 887 F.2d 28. The Order of the Court of Appeals denying rehearing and rehearing in banc (A 1) is unreported.

JURISDICTION

The Judgment of the Court of Appeals was entered on October 5, 1989. The Order denying rehearing and rehearing in banc was entered on November 1, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §2350(a).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, as amended, 29 U.S.C. §157 (herein "the Act") provides:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

Section 8(b)(1) of the National Labor Relations Act, as amended, 29 U.S.C. §158(b)(1) provides:

> (b) It shall be an unfair labor practice for a labor organization or its agents—

> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: *Provided,* that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

STATEMENT OF THE CASE

This case involves issues which are intimately entwined with the federal labor policy and which are of fundamental importance to organized labor. The question presented is whether a labor union may impose internal discipline over members who expressly do not resign yet seek to alter their union membership status during a lawful work stoppage to that of "financial core," a status which is recognized neither by the union's by-laws and constitution, nor the collective bargaining agreement with the employer, and who then cross the picket line, returning to work in violation of the lawful strike.

The operative facts of the instant case arise directly from a lawful economic strike by Local 54, Hotel Employees & Restaurant Employees International Union, AFL-CIO ("Local 54") against Elsinor Shore Associates, t/a Atlantis Casino Hotel ("Atlantis") and the conduct of certain Local 54 members during that strike. At all times material hereto, there was in effect a valid collective bargaining agreement between Local 54 and Atlantis, which contained, in Article II, Section I, the following union security clause:

> It shall be a condition of employment that all employees covered by this Agreement who are members in good standing in the Union on the effective date of this Agreement shall remain members in

> good standing and those who are not members on the effective date of this Agreement shall, on or after the 30th day following the execution of this Agreement, become and remain members in good standing in said Union. In the event that any employee fails to comply with the requirements of this section, the Employer shall discharge said employee within seven (7) days of receipt of written demand. (A 6).

The individual Local 54 members whose conduct is at issue were, at all relevant times, employed in the bargaining unit which is encompassed by the collective bargaining agreement and the aforementioned union security clause.

On September 2, 1987, Local 54 commenced its strike against Atlantis and a lawful picket line was established. The strike action was undertaken in support of the union's position during wage reopener negotiations. The union security clause remained in effect in all regards during the wage reopener negotiations. Sometime after the commencement of the strike, certain Local 54 members, who were employed at Atlantis, forwarded the following form letters to Local 54, which were not resignations, but which purported to change their union membership status from that of a full member to that of a "financial core" member:

> I am an employee of Atlantis Casino Hotel in Atlantic City, New Jersey. This letter will serve as notification that I am changing my membership status in Local 54, Hotel Employee and Restaurant Employees (H.E.R.E.) International Union from that of a "full" member to that of a "financial core" member. As a "financial core" member, I will continue to pay to the union all initiation fees and dues uniformly required of all members for maintaining membership. I am not resigning from the union, I am only changing my membership status. I will not,

> henceforth, be subject to any obligations of membership other than that of paying uniformly required dues and initiation fees required of all Local 54 H.E.R.E. members. (A 6).

After submitting these letters to Local 54, these individuals then crossed the picket line and returned to work in disregard of the work stoppage.

There is no reference to or allowance in the Local 54 and Atlantis collective bargaining agreement or in the Local 54 constitution or by-laws for any variety of membership known as "financial core" o. "core dues payor," or any other agency shop proviso. Upon payment of initiation fees and dues, an individual obtains full membership in Local 54. The individuals involved in this matter had paid the union initiation fees and continued to fully pay required dues subsequent to the issuance of their purported "financial core" letters.

The Local 54 constitution and by-laws do not restrict a member's right to resign membership during a strike. Upon receipt of the "financial core" letters, Local 54 promptly notified the involved individuals via personal letters that the union constitution and by-laws did not provide for "financial core" members, and thereby denied the request to convert membership to "financial core" status. Local 54 further advised that the individuals were still deemed full union members and thus, bound by the terms and conditions of the constitution and by-laws and any obligations arising thereunder.

Subsequent to crossing the picket line in violation of the strike and returning to work, internal union charges were filed against the involved members. Local 54 duly notified the implicated members of the pending charges and of the schedule of hearings on the charges. At the hearings, the individuals involved were found guilty of the charges stemming from their conduct during the strike, and fined in amounts ranging from $50.00 to $1,500.00. The imposed fines were never paid to Local

54 and Local 54 has not sought enforcement or collection of the fines.

On November 25, 1987, an unfair labor practice charge was filed with the National Labor Relations Board ("NLRB") against Local 54 by Joseph Quaranta, an individual union member, alleging that Local 54 violated the National Labor Relations Act by exerting internal union disciplinary procedures against Quaranta and other Atlantis employees who crossed the union's lawful picket line and returned to work during the strike after submitting "financial core" letters. A Consolidated Complaint was issued against Local 54 on March 31, 1988.[2] In its Answer to the Complaint, Local 54 denied that it had engaged in any unfair labor practices.

A hearing on the charges was held before NLRB Administrative Law Judge Joel A. Harmatz. In a decision dated August 8, 1988, Judge Harmatz held that Local 54 engaged in unfair labor practices in violation of Section 8(b)(1)(A) of the Act, 29 U.S.C. §158(b)(1)(A), by failing to accept employee declarations of intent to become "financial core" members, by processing internal union charges against said employees for conduct subsequent to the issuance of the "financial core" declarations, and for fining such members for crossing the picket line and returning to work. The decision of the Administrative Law Judge was subsequently affirmed by a three-member panel of the NLRB.

This case came before the Court of Appeals for the Third Circuit pursuant to Section 10(e) of the Act, 29 U.S.C. §160(e). The Court of Appeals enforced the Order of the NLRB, finding that it was constrained by prior Supreme Court precedent. The impact of the holding of the Court of Appeals is that the right of a labor

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2. Case Number 4-CB-551 was originally consolidated with Case Number 4-CB-5592, a Charge of Unfair Labor Practices filed by Atlantis against Local 54. Case Number 4-CB-5592 was withdrawn on May 24, 1988, with permission of the Regional Director.

organization to make its own internal rules pertaining to union membership is significantly impaired and the ability of a labor organization to effectively fulfill its role as the bargaining representative of a majority of employees is severely weakened.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ for a number of reasons. First, the instant case deserves a writ of certiorari because the Court of Appeals and the NLRB have acted contrary to federal labor policy by improperly interfering with internal union affairs and imposing a classification of union membership status that is not provided by internal union documents and which is in contravention to the valid collective bargaining agreement between the union and the employer. The impact of the decision of the Court of Appeals serves to defeat the statutory language set forth in the proviso of Section 8(b)(1)(A) of the Act, 29 U.S.C. §158(b)(1)(A), which assures that, while labor organizations may not restrain or coerce employees in the exercise of Section 7 rights, the rights of such labor organizations to prescribe rules concerning the acquisition or retention of membership shall not be impaired. The decision below infringes upon internal union administration, in disregard of congressional intent in drafting the language of Section 8(b)(1)(A) not to interfere with the internal affairs or organization of unions.

Second, the instant case merits a writ of certiorari because it concerns an important question of federal law which has not been previously, but should now be, settled by this Court. Prior Supreme Court decisions which address "financial core" membership do so pursuant to Section 8(a)(3) of the Act, 29 U.S.C. §158(a)(3), and/or union membership as a condition of

employment, not under the present circumstances involving internal union discipline against errant members and unfair labor practice charges against a labor union pursuant to Section 8(b)(1)(A). This Court has not yet ruled definitively where a union seeks not to interfere with members' employment rights, but only to impose internal union discipline over members who have engaged in conduct in violation of their membership obligations during a lawful strike.

Acceptance of the Third Circuit decision would have many adverse consequences. First, it would leave standing a decision which is in direct conflict with the congressional intent and express language of Section 8(b)(1)(A) of the Act, 29 U.S.C. §158(b)(1)(A). Second, the decision of the Third Circuit renders meaningless union rules concerning the acquisition or retention of membership, thereby wrongfully intruding upon lawful areas of internal union administration and eliminating the union's ability to uphold its security. The decision serves to prevent the internal enforcement of legitimate union rules. Third, the decision of the Third Circuit wrongfully intrudes upon the collective bargaining relationship between the union and the employer by inserting terms and conditions of employment which are not present in the collective bargaining agreement. Fourth, acceptance of the decision below would fail to address the substantial inequities resulting in allowing certain members to avoid their membership obligations, at the expense of the membership majority, when such obligations are no longer convenient, while simultaneously enjoying the benefits of such membership. Thus, this case presents issues of critical importance to the labor movement and which impact upon union organizations and their members generally.

I. THE COURT SHOULD GRANT THE WRIT AND DECIDE THIS CASE BECAUSE THE DECISION OF THE COURT BELOW CONFLICTS WITH FEDERAL LABOR POLICY

The decision of the court below contravenes the intent of the amendments of the National Labor Relations Act and unduly interferes with collective bargaining relationships and internal union administration.

A. The Decision Below Defeats the Language and Purposes of the Proviso to Section 8(b)(1)(A) of the Act.

The Third Circuit, in enforcing the NLRB's Order, has acted contrary to the Congressional intent and express statutory language of Section 8(b)(1)(A). As a result, the court below has permitted an erroneous NLRB ideology, as represented by the NLRB's position in the instant matter and in the recent prior NLRB decisions of *Carpenters District Council (Tullus Gordon Construction, Inc.)*, 277 NLRB 530 (1985), *Carpenters Local 470 (Tacoma Boatbuilding)*, 277 NLRB 513 (1985) and *Electrical Workers (IBEW) Local 1547 (Telon Electric Corp.)*, 278 NLRB 236 (1986), to stand.

It is plain from the Congressional Record of the conference deliberations resulting in the Act, that the sponsors of Section 8(b)(1)(A) did not intend to affect that part of internal union administration which has to do with questions of membership and enforcing the obligations of membership. Thus, the proviso to Section (b)(1)(A) was inserted to make it perfectly clear that the preceding portion of that Section was inapplicable to the right of a labor organization to prescribe its own rules of membership.[3] 93 Cong. Rec. 4270-4274 (1947).

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3. During the Congressional conference pertaining to the adoption of the 1947 amendments to the Act, Senator Holland, who actually proposed the language of the proviso, prefaced his proposal by stating:

Imposition of "financial core" membership is particularly inappropriate in light of the Congressional intent of Section 8(b)(1)(A) and the specific facts and circumstances of this case. The legality, enforceability and validity of Local 54's by-laws and constitution, which govern Local 54's internal administration, are not at issue nor questioned. These documents do not provide for a class of membership designated as "financial core." The disciplinary proceedings and penalties imposed by Local 54 against its errant members who violated the strike were internal proceedings and did not impact upon such members' employment rights vis-a-vis the employer. By improperly interfering with internal union administration, the court below has ruled in disregard of the statutory language itself and the Congressional intent behind the statute.

NOTES *(Continued)*

> Apparently it is not intended by the sponsors of the amendment to affect at least that part of the internal administration which has to do with the admission or the expulsion of members, that is, with questions of membership.
>
> 93 Cong. Rec. 4271 (1947)

In urging approval of the proviso of Section 8(b)(1)(A), Senator Holland subsequently stated:

> In other words, if accepted by the Sponsors of the pending amendment, the inserted words would make it clear that the pending amendment would have no application to or effect upon the right of a labor organization to prescribe its own rules of membership either with respect to beginning or terminating membership.
>
> 93 Cong. Rec. 4272 (1947)

Senator Ball, a sponsor of Section 8(b)(1) explained:

> It was never the intention of the sponsors of the pending amendment to interfere with the internal affairs or organization of unions.
>
> 93 Cong. Rec. 4272 (1947)

B. The Collective Bargaining Relationship Between the Union and the Employer and the Union's Ability to Fulfill its Representational Obligations Have Been Jeopardized.

By removing from the jurisdiction of internal union procedures individuals who merely attempt to alter their membership status but do not resign from the union, and who then violate their membership obligations, the court below and the NLRB have improperly interfered with Local 54's abilities to fulfill its collective bargaining responsibilities, in violation of the Act. As has been recognized by the Supreme Court, in order for a union to fulfill its obligations of collective bargaining, it must have the ability to promulgate its own rules and have the right to impose reasonable discipline on members who do not obey the rules. *NLRB v. Allis-Chambers Manufacturing Co.*, 388 U.S. 175 (1967).

In the instant case, Local 54 has acted lawfully in that its members have the unfettered right to resign and there is no allegation that Local 54 has attempted to restrict that process. Nonetheless, the NLRB, and subsequently the court below, by prohibiting discipline of the members involved, has precluded Local 54 from exercising the power to reasonably discipline members who act to defeat the lawful activities of the union as sanctioned by the majority of the membership. Obviously, if Local 54 is unable to discipline members who have acted contrary to their membership obligations, its ability to properly fulfill collective bargaining responsibilities is seriously hampered.

The decision of the court below serves to seriously threaten and dilute the concept of union solidarity. "Financial core" members who violate their union obligations during an ongoing strike reap the benefits of union solidarity while acting in a manner inconsistent with the goals of union solidarity. Members who refuse to exercise their right to resign, yet return to work

during a lawful work stoppage, not only dilute the concept of union solidarity, but serve to defeat the purpose and effectiveness of the strike, at the expense of the majority of their fellow members.

The decision of the court below jeopardizes and interferes with the lawful collective bargaining relationship between the union and the employer by forcing upon the parties terms and conditions of employment which are not present in the collective bargaining agreement. The Supreme Court has resolved that the inclusion of agency shop provisions is a mandatory area of collective bargaining. *NLRB v. General Motors, Corp.*, 373 U.S. 734 (1963). Similarly, union security is also a mandatory area of collective bargaining. Through the negotiation process, Local 54 and Atlantis bargained and agreed upon a valid union shop clause. The time during which the possibility of a reduced form of union membership could have been considered was during and through the collective bargaining process and the negotiations which culminated in the collective bargaining agreement. By approving financial core membership where the parties have not done so, the court below has supplanted its will for that of the parties and, ultimately, has defeated the collective bargaining process.

Further, by injecting agency shop provisions into a labor management relationship which adheres to a union security clause, the court below has removed the recognized distinction between a union and agency shop, and has rendered the bargained for union security clause null and void.

II. THE COURT SHOULD GRANT THE WRIT AND DECIDE THIS CASE BECAUSE THE COURT BELOW'S DECISION CONCERNS AN IMPORTANT QUESTION OF FEDERAL LABOR LAW, WITH SERIOUS CONSEQUENCES TO LABOR ORGANIZATIONS AND THEIR MEMBERS, WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The decision of the court below results in great inequities to labor organizations and the members which they serve and on whose behalf they act. The decision removes from labor organizations the ability to regulate their internal administration and greatly broadens the scope of what conduct engaged in by a labor organization constitutes an unfair labor practice. The decision below bears serious consequences upon labor organizations and their loyal membership in that errant members may act contrary to and defeat the goals and desires of the majority, and fully escape discipline for doing so. The Third Circuit and the NLRB have removed from unions the right to regulate their internal affairs and to enforce legitimate union rules by the issuance of fines, and have thereby eliminated protections to those union members who choose to honor their membership obligations and responsibilities. The decision below is additionally unjust in that it permits individuals to retain their union membership and to reap all of the benefits associated with such membership, without requiring that such individuals adhere to the obligations and responsibilities attendant with union membership. The Third Circuit has, in essence, emasculated labor organizations, by denying them the means to enforce the obligations that arise from union membership.

This Court has not yet entered a decision which addresses the propriety of "financial core" membership within the confines of Section 8(b)(1)(A) of the Act, 29

U.S.C. §158(8(b)(1)(A), and the ability of a labor organization to exert internal disciplinary measures – which do not interfere with the member's employment – over such members who engage in conduct violative of a lawful strike action sanctioned by the union and the majority of its membership. In *NLRB v. General Motors Corp.,* 373 U.S. 734 at 742 (1963), when the Court stated that " 'membership,' as a condition of employment is whittled down to its financial core," it addressed the concerns of Section 8(a)(3) of the Act, 29 U.S.C. §158(a)(3) only, not the distinct rights and concerns of Section 8(b)(1)(A). Similarly, *Radio Officers' Union v. NLRB,* 347 U.S. 17 (1954), in which the Court stated that union security agreements may only be used for the purpose of compelling payment of union fees and dues, was decided within the context of an employee's relationship to the employer.

In the case at hand, Local 54 does not seek to interfere with the relationship of the disciplined members to their employer. There is no allegation that Local 54 attempted to cause the employer to terminate or suspend the employment of the disciplined members. Section 8(a)(3) is not at issue here.

Local 54 simply acted in a manner consistent with *NLRB v. Allis-Chambers Manufacturing Co.,* 338 U.S. 175 (1967), where this Court held that in accordance with Section 8(b)(1)(A) of the Act, unions may lawfully enforce strike solidarity by fines and expulsion against members who dishonor a lawful strike and return to work. Local 54's imposition of discipline against the involved members was clearly within the confines of *NLRB v. Textile Workers,* 409 U.S. 213 (1972), in which this Court held that a labor union may not discipline members who resigned prior to crossing a picket line. In the case at hand, the members who crossed Local 54's lawful picket line were active, current union members at the time that they did so. These members specifically did

not resign their union membership prior to crossing their union's picket line.

Further, *Pattern Makers' League v. NLRB,* 473 U.S. 95 (1985), in which the Court affirmed the right of union members to resign during a strike, does not speak to the important concerns of the instant matter. Local 54 does not question the right of members to resign their membership during a strike and thereafter return to work. Nor does Local 54 contend that it has the authority to impose internal union discipline against individuals who duly resigned their membership prior to contravening the strike action. However, in the instant matter, the individuals involved expressly chose to retain their union membership and, while attempting to alter their membership status, specifically did not resign from membership.

CONCLUSION

For the foregoing reasons, Local 54 requests the Court to grant a Writ of Certiorari to review the decision and judgment of the Third Circuit in this case.

Respectfully submitted,

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APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 89-3170

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

LOCAL 54, HOTEL EMPLOYEES & RESTAURANT EMPLOYEES INTERNATIONAL UNION, AFL-CIO
Respondent

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge,* HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, and ALDISERT* *Circuit Judges.*

The petition for rehearing filed by respondent in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

Carol Los Mansmann

Circuit Judge

Dated: November 1, 1989

* Senior Judge Aldisert was limited to voting on rehearing before the original panel.

Filed October 5, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-3170

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

LOCAL 54, HOTEL EMPLOYEES & RESTAURANT EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Respondent.

On Application for Enforcement of a Final Order
of The National Labor Relations Board
(NLRB 4-CB-5551)

Argued, September 7, 1989

Before: MANSMANN, NYGAARD and ALDISERT,
Circuit Judges.

(Filed October 5, 1989)

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OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

This is another in a line of recent cases before the National Labor Relations Board presenting the issue of whether union members, who wish to cross a picket line, may do so without fear of union discipline if they first unilaterally change their membership from "full" to "financial core" status. Financial core membership permits an employee to maintain a dues-paying association with the Union that will protect him or her against the threat of discharge under Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), without subjecting him to the responsibilities and regulations of full membership.

We must decide whether a union violates Section 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A), by refusing to recognize financial core as a permissible form of union membership and then imposing disciplinary fines on bargaining unit employees who cross a picket line and return to work after notifying the union that they wish to change their status from full to financial core membership.

At issue are two competing policies contained in the Labor Act. One national policy holds that a union functioning as a representative of a group of employees may need both their financial support and some means

of controlling dissident elements if is to fulfill most effectively its role as the exclusive representative of the entire group. See *Hershey Foods Corp.*, 207 NLRB 897, 903 (1973). Another policy is expressed by specific statutory language: "Employees . . . have the right to refrain from any and all . . . activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment. . . ." 29 U.S.C. § 157. When membership in a union is required as a condition of employment, a tension results if the employee should desire to invoke his Section 7 right to refrain from a concerted activity such as a strike. It is the Union's contention that the employee in such a case must either remain a member of the Union and expose himself to the possibility of union discipline or resign from the Union and subject himself to the loss of his job.

Before us is the application of the Board for enforcement of an order issued on November 30, 1988, against Local 54, Hotel Employees and Restaurant Employees International Union, AFL-CIO. We have jurisdiction under 29 U.S.C. 160(e). The Board certified that its order in the unfair labor practice proceedings is a final order within the meaning of Section 10(e) of the Act. Appeal was timely filed under Rule 4(a), Fed. R. App. P.

The standard of review gives the Board's determinations great deference both as to conclusions of law and findings of fact. The Board's conclusions of law are entitled to respect if based upon a reasonably defensible construction of the Act. *NLRB v. United Food & Commercial Wkrs. Local 23*, 484 U.S. 112, 108 S.Ct. 413, 421 (1987); *Pattern Makers' League v. NLRB*, 473 U.S. 95, 100 (1985). The Board's findings of fact must be sustained if they are supported by substantial evidence on the record considered as a

whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-91 (1951); *Hunter Douglas, Inc. v. NLRB*, 804 F.2d 808, 812-813 (3d Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987).

I.

The facts are not in dispute. The Respondent-Union, Local 54, Hotel Employees & Restaurant Employees International Union, AFL-CIO, admits that it rejected appeals by certain members for financial core status before those members refused to honor a strike and returned to work. The Union predicated the rejection on the theory that financial core status is not recognized explicitly in the Union constitution or by-laws. The Union brought internal disciplinary charges against many of the non-striking members and many were fined for having crossed the picket line. The Board challenges each of these actions as violative of Section 8(b)(1)(A) of the Act.

The employer is Elsinore Shore Associates, trading as Atlantis Casino Hotel. It is a New Jersey partnership engaged in the operation of the hotel and casino in Atlantic City, New Jersey, the sole facility involved in this proceeding. The Union represents the employees of the Atlantis Casino Hotel.

The Employer and the Union were parties to a collective-bargaining agreement with a term of September 15, 1983 to September 15, 1988. That agreement included a wage reopener clause. On September 2, 1987, a picket line was established to further the Union's economic demands during the interim negotiations. The unexpired collective-bargaining agreement remained in force throughout the strike. On various dates between September 29, 1987 and February 1, 1988, when the pickets were withdrawn, more than one hundred bargaining unit employees dishonored the picket line

and returned to work. Before doing so, each forwarded to the Union the following letter:

> I am an employee of Atlantis Casino Hotel in Atlantic City, New Jersey. This letter will serve as notification that I am changing my membership status in Local 54, Hotel Employee and Restaurant Employees (H.E.R.E.) International Union from that of a "full" member to that of a "financial core" member. As a "financial core" member, I will continue to pay to the union all initiation fees and dues uniformly required of all members of maintaining membership. I am not resigning from the union. I am only changing my membership status. I will not, henceforth, be subject to any obligations of membership other than that of paying uniformly required dues and initiation fees required of all Local 54 H.E.R.E. members.

App. at 13-14A.

Before taking that step, all were members of the Union in good standing, with no arrearages in their dues obligation. All were covered by the following union security provision in the existing collective-bargaining agreement:

> It shall be a condition of employment that all employees covered by this agreement who are members in good standing in the Union on the effective date of this Agreement shall remain members in good standing and those who are not members on the effective date of this Agreement shall, on or after the 30th day following the execution of this Agreement, become and remain members in good standing in said Union. In the event that any employee fails to comply with the requirements of this section, the Employer shall discharge said employee within seven (7) days of receipt of written demand.

App. at 14A. After returning to work the self-styled "financial core" members continued to satisfy their financial obligations to the Union.

The "financial core" membership concept derives from a series of statements contained in Supreme Court cases summarized in *Pattern Makers' League v. NLRB*, 473 U.S. 95, 106 n.16 (1985):

> Under § 8(a)(3), the only aspect of union membership that can be required pursuant to a union shop agreement is the payment of dues. See *Radio Officers v. NLRB*, 347 U.S. 17, 41 (1954), (union security agreements cannot be used for "any purpose other than to compel payment of union dues and fees"). "'Membership,' as a condition of employment, is whittled down to its financial core." *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963). See also *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), (under the Railway Labor Act, employees in a "union shop" cannot be compelled to pay dues to support certain union activities). Therefore, an employee required by a union security agreement to assume financial "membership" is not subject to union discipline. Such an employee is a "member" of the union only in the most limited sense.

Neither the Union's constitution and its by-laws, nor the collective bargaining agreement differentiates between full membership and "financial core membership." These documents neither mention, nor authorize any limited form of membership. The timely payment of dues and initiation fees constitutes the only condition for the privilege of full membership. Consistent therewith, the Union responded to most of those who sought financial core status, as follows:

> We have received your letter . . . in which you advise that you seek to alter your membership in

> this Union to that of a "financial core" member. Under the Constitution and By-laws of this Union there is no provision for "financial core" affiliation. The only level of affiliation which exists is that of a full member based on the payment of required dues and initiation fees. In this regard you should note that the question of whether the Constitution and By-laws of the Union should be altered or amended to permit financial core membership has been considered by the Executive Board and General Membership and rejected.
>
> Accordingly, please be advised that your request for financial core status must be denied. You are at this juncture still deemed to be a full member of this Union and accordingly bound by the terms and conditions of its By-laws and all obligations arising thereunder. If you have any questions concerning this matter, please do not hesitate to contact this office.

App. at 14A.

Thereafter, most of the nonstrikers received notification that intra-union charges were being brought against them because they crossed the picket line. Additionally, after notice and hearing, almost half were notified by the Union that they had been deemed guilty of the charges and fined in amounts ranging from $50 to $1500.

II.

Our task here is very important. Supreme Court precedent has permitted union members to resign and then cross a picket line and thereby absolve themselves of union fines and other disciplinary action. See *Pattern Makers*; *NLRB v. Textile Workers*, 409 U.S. 213 (1972). We must decide whether it is appropriate to extend immunity from union disciplinary action to

those members who do not resign, but change their relationship in the union to mere financial core status. The Board has been willing to do this. It has extended this precept and has absolved union members from the risk of fines and disciplinary action where the members have assumed "financial core" status before crossing the picket lines. *Carpenters Local 470* (Tacoma Boatbuilding), 277 NLRB 513 (1985) and *Carpenters District Council* (Gordon Construction), 277 NLRB 530 (1985). This case requires us to decide whether the Board had the authority to do this. Before us the union vigorously takes two positions: first, that *Tacoma Boatbuilders* and *Gordon Construction* were incorrectly decided. It argues that the cases improperly limit the power of a labor union to enforce strike discipline by giving union members the right to dilute the critical concept of concerted action as an economic weapon in the bargaining process. Alternatively, it contends that even if those holdings were proper, the material facts here differ from those there.

The Board determined that the Union violated Section 8(b)(1)(A) by denying employees the right to change their membership status and thereafter by threatening to discipline and disciplining these employees because they crossed the picket line and returned to work. They predicated this determination on settled Board authority. The Union argues that the Board action intrudes upon purely internal union matters and that it denies to the union fruits of collective bargaining by failing to observe differences between union security and agency shop agreements. This argument requires us to review relevant Supreme Court teachings in this sensitive area that delineate the distinctions between rights of a union vis a vis its members and the rights of members vis a vis their union.

III.

As a general rule, under the provisions of Section 7, employees are free to decide for themselves whether they wish to support a strike or cross a picket line and report to work. 29 U.S.C. § 157. The Act insulates them from intimidation in making that determination. Yet employees who elect to break a strike while purporting to retain full union membership may expose themselves to certain consequences. They fall within a narrow exception to the general guarantee. In *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967), the Court held that unions may legitimately enforce strike solidarity by fines and expulsion against members who dishonor a lawful strike and return to work. Discipline in those circumstances was deemed to be consistent with the 8(b)(1)(A) proviso which exempts from regulation the right of a labor organization "to prescribe its own rules with respect to the acquisition or retention of membership therein." 388 U.S. at 178 (citation omitted).

Five years after its decision in *Allis-Chalmers*, the Court added a new gloss to its teachings. It determined that a labor organization's prerogatives in this respect are limited strictly to active, current union members. In *NLRB v. Textile Workers*, 409 U.S. 213 (1972), the Court held that a labor organization could not lawfully discipline a member who resigned prior to crossing a picket line. Later, the Court narrowed further the permissible reach of internal discipline. In *International Assoc. of Machinists & Aerospace Workers, Local Lodge 1414*, 270 NLRB 1330 (1984), the Board decided that union members have the unfettered right to resign and that union restrictions on that process are a nullity. This view was affirmed by the Court in *Pattern Makers, supra*. The Court agreed that such restrictions "are invalid and do not justify imposing sanctions on employees who have attempted

to resign from the Union." *Id.* at 100. Accordingly, the Court concluded that "[Section] 8(b)(1)(A) properly may be construed as prohibiting the fining of employees who have tendered resignations ineffective under a restriction in the union constitution." *Id.* Thus, the task before us is to decide if the Board may take the additional step of prohibiting the union from imposing fines on a member who has not resigned, but has elected to take the status of "financial core" even though that status is not reflected *ipsissimis verbis* in the Union's constitution or by-laws.

IV.

The Union argues that it acted within lawful perimeters and did nothing more than what *Allis-Chalmers* permits. To be sure, the general rule is that a labor organization may lawfully invoke internal disciplinary machinery against full members, who remain in that capacity and have violated internal rules. The Union argues that this is precisely what has occurred here because the involved employees had not "resigned from union membership." It also claims that resignations were not restricted by internal rules and they would not have rejected resignations if duly tendered. In essence, Local 54 claims that its sole vice was the refusal to recognize "financial core membership." Because no resignations were implicated here, it argues that the prohibition of *Pattern Makers* does not apply.

Yet, we must recognize that *Allis-Chalmers* addressed neither the rights of members who resigned nor, as we have here, the rights of members who assumed a membership status less than full membership. Nor did *Scofield v. NLRB*, 394 U.S. 423, (1969) address this question. There the Court held that those who remained members while violating union regulations are vulnerable to legitimate

discipline. However, in its discussion the Court fashioned an "escape hatch." It set forth three conditions for lawful enforcement of an internal union regulation: Section 8(b)(1)(A) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has embedded in the labor laws, and is reasonably enforced against union members *who are free to leave the union and escape the rule.*" 394 U.S. at 430 (emphasis supplied). Consistent with this "escape" requirement, the Court in 1972 in *NLRB v. Textile Workers*, commented that "the vitality of § 7 requires that the member be free to refrain in November from the actions he endorsed in May. . . ." 409 U.S. at 217-218. Again, 13 years later, in *Pattern Makers*, the Court condemned "union restrictions on the right to resign [as] inconsistent with the policy of voluntary unionism." 473 U.S. at 104.

V.

The Board obviously has seen in these recent pronouncements an emphasis on "voluntary unionism." This policy does not reduce the power of a union to call a strike. But it does place upon the union the important responsibility to convince its members that the proposed strike is essential and is properly justified. This obligation requires the union's officers and the promoters of the strike in the democratic process to ensure widespread support of the strike action in order to forestall subsequent resignations or conversions to "financial core" membership. Thus, the concept of union solidarity is not threatened or diluted. Instead, it places upon the union leadership the very important duty to test the waters carefully to ensure that there is substantial support for a proposed strike action.

As stated before, the Board's philosophy is reflected in *Carpenters Local 470* (Tacoma

Boatbuilding), 277 NLRB 513 (1985) and *Carpenters Dist. Council* (Gordon Construction), 277 NLRB 530 (1985), where the Board allowed employees to remain members and yet assume financial core status, and thereafter be exempt from union penalties. In these cases, Section 8(b)(1)(A) violations were predicated upon enforcement of strike solidarity rules against union members who, before crossing the picket line, clearly communicated their intent to become financial core members. In *Tacoma Boatbuilding*, the employees notified the union that they were not resigning from membership, but as a "financial core members" they would not "henceforth, be subject to any obligations of membership other than that of paying uniformly required, dues and initiation fees. . . . " 277 NLRB at 513. The Board held that such a letter was sufficient to establish financial core status, and further that such members could not lawfully be subjected to union discipline. These decisions seem to be ample Board precedent for the decision here.

A.

Nonetheless, the Union would have us reject or distinguish these cases because "they involve situations where there was no collective-bargaining agreement in effect." It argues that if the Union and Employer wished to provide for "financial core" or any other type of less-than-full membership, the time to do so would have been during their contract negotiations. Brief for Respondent at 16. However, it would seem that if financial core members are immune from discipline where their offensive conduct relates to renegotiation of an expired contract, surely, that protection should not be lost where the strike is pursuant to a mid-term wage reopener. The coercive impact of union discipline upon Section 7 rights should be the same in either case.

The Union argues that the existence of a viable, presently enforceable union shop agreement tips the scales in its favor. But again it would seem that such an agreement heightens the case for financial core immunity. The problem was addressed in *Tacoma*:

> [W]hen there is a union security clause in effect an employee must retain financial core status as a condition for employment. To then say, however, that a financial core member is subject to the same discipline as a full member is to render meaningless the third part of the *Scofield* test, namely that a member is free to leave the union and escape the rule.

277 NLRB at 514. In *Gordon Construction*, the Board added:

> [F]inancial core membership permits an employee to maintain a dues-paying association with the union that will protect him against the threat of discharge under Section 8(a)(3) of the Act when the collective-bargaining agreement contains a union-security provision. . . . If the designation of financial core or dues paying only membership is to impart any significance then it must be recognized that it does not rise to the level of full membership for all purposes, but rather is a limited affiliation which excludes the employee from certain rights accorded to full members and also removes him from the reach of union fines.

277 NLRB at 531 (relying on *Hershey Foods Corp.*, 207 NLRB 897 (1973), *enforced*, 513 F.2d 1083 (9th Cir. 1975) (footnote omitted)).

B.

According to the Board, the Union's construction of the union shop arrangement would limit the

unwitting member to two choices: to support the strike or to resign from full membership and risk discharge. To be sure, the spectre of job loss inherent under a union shop arrangement would offer a forceful medium for compelling obedience to union strategy. Yet if striking members enjoy a statutorily protected right to change their minds and return to work after communicating their resignations, that choice ought be, and is free of job loss constraints. Indeed, the Labor Act defines as an unfair labor practice any action of a union that might cause an employer to discriminate against an employee "on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . ." 28 U.S.C. § 158(b)(2).

The Union further argues that this theory allowing financial core membership regardless of whether it is provided in the union shop agreement interferes with the process of collective bargaining. In this respect, the Union contends that *Tacoma Boatbuilding* obliterates the distinction between union shop and agency shop agreements, thus diminishing the choices available in collective bargaining and rendering meaningless a Union's successful negotiation of a union shop clause, a mandatory bargaining subject.

However persuasive the Union's arguments would have been had this court been operating on a clean slate, we cannot be persuaded by them because the Supreme Court has already spoken in this field. First, the only aspect of union membership that can be required pursuant to a union shop agreement is the payment of dues. Second, membership as a condition of employment has been whittled down to its financial core. Third, a distinction exists between full membership and financial core membership. Fourth, an employee required by a union security agreement to assume financial core "membership" is not subject to

union discipline. *See Pattern Makers League v. NLRB*, 473 U.S. 95, 106 n.16 (1985) (citing *Radio Officers v. NLRB*, 347 U.S. 17, 41 (1954); *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984)).

VI.

Upon consideration of all contentions raised by the petitioner, the order of the National Labor Relations Board will be enforced.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

291 NLRB NO. 140
UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

LOCAL 54, HOTEL EMPLOYEES
& RESTAURANT EMPLOYEES
INTERNATIONAL UNION, AFL-CIO
(Atlantis Casino Hotel)

and Case 4-CB-5551

JOSEPH QUARANTA, an Individual

DECISION AND ORDER

On August 8, 1988, Administrative Law Judge Joel A. Harmatz issued the attached decision. The Respondent filed exceptions and a supporting brief,[1] the General Counsel filed cross-exceptions and a brief in support of the cross-exceptions and in answer to the Respondent's exceptions,[2] and the Charging Party filed a brief in opposition to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-year panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has

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1. The Respondent also filed a motion for oral argument. The motion is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

2. The General Counsel has excepted only to the judge's failure to include a provision in his recommended Order requiring the Respondent to notify those employees who sought to resign from full membership, in writing, that their resignations have been accepted. We find merit in the General Counsel's exception and shall, accordingly, modify the judge's Order to include such remedial language. Also, the General Counsel correctly asserts in the exceptions that par. 2(b), L. 3, of the judge's recommended Order should read ". . . all employee-members in the appropriate collective bargaining unit . . ." the judge's recommended Order shall be corrected in this respect.

decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Local 54, Hotel Employees and Restaurant Employees International Union, AFL-CIO, Atlantic City, New Jersey, its officers, agents, and representatives shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

"(b) Notify, in writing, all employee-members who tendered resignations from full membership that their resignations have been accepted as of the date received."

2. Substitute the following for new paragraph 2(c).

"(c) Expunge from its records all references to the aforedescribed charges and fines and notify all employee-members in the appropriate collective-bargaining unit that all fines have been rescinded, all records of charges expunged, and that financial core status henceforth shall be recognized as a permissible form of union membership."

3. Substitute the attached notice for that of the administrative law judge.

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3. The correct citation to *New Horizons for the Retarded* is 283 NLRB No. 181 (May 28, 1987).

Dated, Washington, D.C. November 30, 1988

James M. Stephens, Chairman

Mary Miller Cracraft, Member

John E. Higgins, Jr. Member

(SEAL) NATIONAL LABOR
RELATIONS BOARD

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT decline any request by an employee that he or she wishes to resign from full union membership and become financial core members obligated only to tender periodic dues and uniformly applied fees.

WE WILL NOT process internal union charges against you or fine you for activities in which you have engaged after becoming financial core members obligated only to tender periodic dues and uniformly applied fees.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind all charges and fines imposed on employee-members for conduct that occurred after they became financial core members, and WE WILL refund any such fines that they have paid, plus interest.

WE WILL expunge all references to the unlawful charges and fines from our records.

WE WILL notify, in writing, those employees who tendered their resignations from full membership that

their resignations have been accepted as of the date received.

LOCAL 54, HOTEL EMPLOYEES
& RESTAURANT EMPLOYEES
INTERNATIONAL UNION,
AFL-CIO

_____
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered be any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 615 Chestnut Street, 7th Floor, Philadelphia, Pennsylvania 19106-4404, Telephone 215-597-7643.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LOCAL 54, HOTEL EMPLOYEES & RESTAURANT EMPLOYEES INTERNATIONAL UNION AFL-CIO (Atlantis Casino and Hotel)

Case No. 4-CB-5551[1]

and

JOSEPH QUARANTA, An individual

Dennis P. Walsh, Esq., and Margaret McGovern, Esq., of Philadelphia, PA, for the General Counsel.
Howard R. Flaxman, Esq. (Blank, Rome, Comisky and McCauley), of Philadelphia, PA, for the Charging Party.
Bernard N. Katz, Esq. and Lynne P. Fox, Esq. (Meranze & Katz), of Philadelphia, PA, for the Respondent.

DECISION

Statement of the Case

JOEL A. HARMATZ, Administrative Law Judge: This proceeding was heard by the undersigned on May 24, 1988, in Linwood, New Jersey, upon an original unfair labor practice charge filed on November 25, 1987, and a consolidated complaint issued on March 31, 1988. The complaint alleged that Respondent violated Section 8(b)(1)(A) of the Act by refusing to accept membership resignations from bargaining unit employees, and by later invoking internal disciplinary procedures against

1. The caption is amended to reflect that prior to the opening of the hearing, the Regional Director for Region 4 severed Case No. 4-CB-5552, which theretofore had been consolidated herewith. See GCX-1(p).

and fining certain of these employees because they returned to work during a strike. In it's duly filed answer, the Respondent denied that any unfair labor practices were committed. Following close of the hearing, briefs were filed on behalf of the General Counsel, the Charging Party, and the Respondent.

Upon the entire record in this proceeding, including consideration of the post-hearing briefs, it is hereby found as follows:

I. Jurisdiction

The Employer, Elsinore Shore Associates, T/A Atlantis Casino Hotel, is a New Jersey partnership engaged in the operation of a hotel and casino in Atlantic City, New Jersey, the sole facility involved in this proceeding. In the course of said operations, the Employer during the calendar year preceding issuance of the complaint, a representative period, derived gross revenues exceeding $500,000, and purchased goods and materials valued in-excess of $50,000 directly from points outside the State of New Jersey. The complaint alleges, the answer admits, and it is found that the Employer is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

The complaint alleges, the answer admits, and it is found that Local 54, Hotel Employees & Restaurant Employees International Union, AFL-CIO, the Respondent herein, is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

This is another in a line of recent cases presenting the issue of whether union members, who wish to cross

a lawful picket line, may do so without fear of union discipline by, themselves, unilaterally changing their membership to "financial core" status.

The facts are not in dispute. The Respondent-Union admits that it rejected appeals by certain members for financial core status before they broke a strike and returned to work. It is further conceded that internal disciplinary charges were brought against many of these members and many were fined for having crossed the picket line. The complaint challenges each of these actions as violative of Section 8(b)(1)(A).

Specifically, the Employer and the Union are parties to a *current* collective-bargaining agreement with a term of September 15, 1983 to September 15, 1988. That agreement included a wage reopener clause. On September 2, 1987, a picket line was established to further the Union's economic demands during the interim negotiations.

The unexpired collective-bargaining agreement remained in force throughout the strike. According to the complaint, on various dates between September 29, 1987 and February 1, 1988, when the pickets were withdrawn, more than one hundred bargaining unit employees dishonored the picket line and returned to work. Before doing so, each forwarded to the Union the following letter:

> I am an employee of Atlantis Casino Hotel in Atlantic City, New Jersey. This letter will serve as notification that I am changing my membership status in Local 54, Hotel Employee and Restaurant Employees (H.E.R.E.) International Union from that of a "full" member to that of a "financial core" member. As a "financial core", member, I will continue to pay to the union all initiation fees and dues uniformly required of all members of maintaining membership. I am not resigning from the union, I am only changing my membership status. I will

> not, henceforth, be subject to any obligations of membership other than that of paying uniformly required dues and initiation fees required of all Local 54 H.E.R.E. members.

Before taking that step, all were members of the Union in good standing, with no arrearages in their dues obligation. All were covered by the following union security provision in the subsisting collective-bargaining agreement:

> It shall be a condition of employment that all employees covered by this agreement who are members in good standing in the Union on the effective date of this Agreement shall remain members in good standing and those who are not members on the effective date of this Agreement shall, on or after the 30th day following the execution of this Agreement, become and remain members in good standing in said Union. In the event that any employee fails to comply with the requirements of this section, the Employer shall discharge said employee within seven (7) days of receipt of written demand.

After returning to work, the strikebreakers continued to satisfy their financial obligations to the Union.

Neither the Union's constitution, it's bylaws, nor the collective bargaining agreement differentiates between full membership and "financial core membership". Said documents neither mention, nor authorize any limited form of membership. The timely payment of dues and initiation fees constitutes the only condition for the privilege of full membership. Consistent therewith, the Union responded to most of those who sought financial core status, as follows:

> We have received your letter . . . . in which you advise that you seek to alter your membership in this Union to that of a "financial core" member. Under the Constitution and By-laws of this Union there is

> no provision for "financial core" affiliation. The only level of affiliation which exists is that of a full member based on the payment of required dues and initiation fees. In this regard you should note that the question of whether the Constitution and By-laws of the Union should be altered or amended to permit financial core membership has been considered by the Executive Board and General Membership and rejected.
>
> Accordingly, please be advised that your request for financial core status must be denied. You are at this juncture still deemed to be a full member of this Union and accordingly bound by the terms and conditions of its By-laws and all obligations arising thereunder. If you have any questions concerning this matter, please do not hesitate to contact this office.

Thereafter, most of the nonstrikers received notification that intra-union charges were being brought against them because they crossed the picket line. Additionally, after notice and hearing, almost half were notified by the Union that they had been deemed guilty of the said charges and fined in amounts ranging from $50 to $1500. To date, no fines have been paid, and the Respondent has not taken affirmative steps to secure their collection.[2]

The proponents of the complaint argue that the Union violated Section 8(b)(1)(A) of the Act by denying employees the right to change their membership status and thereafter by threatening to discipline and disciplining these employees because they crossed the picket line

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2. The complaint identifies by name numerous employees affected in this regard. Since others might have been involved, the parties stipulated that any remedy be extended to include all similarly situated employees not identified by the pleadings. It was agreed that this would be accomplished through the compliance process.

and returned to work. Both the Charging Party and General Counsel insist that this result is dictated by settled Board authority. The Union would distinguish such precedent, and argues that the complaint's underlying theory intrudes upon purely internal union matters, and denies it the fruits of collective bargaining by failing to observe differences between union security and agency shop arrangements.

As a general rule, employees, under the aegis of Section 7 of the Act, are free to decide for themselves whether they wish to support a strike or cross a picket line and report to work. The Act insulates them from intimidation in making that determination. At the same time, employees who elect to break a strike while retaining full union membership are within a narrow exception to that guarantee. Thus, in *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967), the Supreme Court held that unions may legitimately enforce strike solidarity by fines and expulsion against members who dishonor a lawful strike and return to work. Discipline in those circumstances was deemed to be consistent with the 8(b)(1)(A) proviso which exempts from regulation the right of a labor organization "to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ."

Five years after its decision in *Allis-Chalmers*, the Supreme Court clarified that a labor organization's prerogatives in this respect are limited strictly to union members. Thus, in *NLRB v. Textile Workers Local 1029, Granite State Joint Board*, 409 U.S. 213 (1972), the Court held that a labor organization could not lawfully discipline a member who resigned prior to his crossing a picket line. Later, the permissible reach of internal discipline was narrowed further in *Machinist Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984), where the Board held that union members have the unfettered right to resign and that union restrictions on that process are a nullity. In 1985 this view was

affirmed by the Supreme Court, in *Pattern Makers League v. NLRB*, ___ U.S. ___, 119 LRRM 2929. In doing so, the Court agreed that such restrictions "are invalid and do not justify imposing sanctions on employees who have attempted to resign from the Union." Accordingly, the Court concluded that "Section 8(b)(1)(A) reasonably may be construed . . . as prohibiting a union from fining members who have tendered resignations [even if] invalid under the union constitution."

The Respondent argues that it acted within lawful parameters and did nothing more than what *Allis-Chalmers* permits. There can be no quarrel that, under settled authority, a labor organization may lawfully invoke internal disciplinary machinery against full members, who remain in that capacity, while violating internal rules against strike-breaking. The Respondent argues that no more has occurred here since the employees involved at no time "resigned from union membership". Moreover, the Respondent also observes that there is no evidence that such resignations were restricted by internal rules, nor does it appear that the Union would have rejected such resignations if duly tendered. In essence, Respondent claims that its sole vice was the refusal to recognize "financial core membership" and hence its action against those who sought to return to work under this umbrella was inoffensive to the Court's ruling in *Pattern Makers, supra.*

The holding in *Allis-Chalmers, supra,* did not address this question. There, the members involved made no attempt to alter their association with the Union before returning to their strike-bound jobs. The Court in that case did reconcile the conflict between the Section 7 right to refrain from strike action, on the one hand, and the fact that " . . . the sponsor of Section 8(b)(1)(A) never intended for that provision to interfere with the internal affairs . . . of unions." 388 U.S. at p. 187. However, as the Supreme Court would later recognize

"the crux of [that] holding was the distinction between" internal and external enforcement of union rules . . ." See *Pattern Makers League, supra,* 119 LRRM at p. 2932. In *Scofield v. NLRB,* 394 U.S. 423 (1969), the Supreme Court again held that those who remained members while violating union regulations are vulnerable to legitimate discipline. However, that decision would later prove to be the touchstone for a judicially approved concept of "voluntarism," whereby employees are given broad personal discretion to alter their membership and neutralize internal union restrictions. Thus, the Court at 394 U.S. 430 adopted three conditions for law enforcement of an internal union regulation, stating: "Section 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has embedded in the labor laws, and is reasonably enforced against union members *who are free to leave the union and escape the rule (emphasis supplied).* Consistent with this "escape" requirement, the Court in *NLRB v. Textile Workers, supra.,* commented that "the vitality of Section 7 requires that a member be free in November from the action he endorsed in May." 409 U.S. at pp. 217-218. Again, 13 years later, in *Pattern Makers, supra.,* the Court deemed "union restrictions on the right to resign [as] inconsistent with the policy of voluntary unionism."

The General Counsel and Charging Party carry voluntarism one step further. They point to precedent that employees who remain members, but declare financial core status, thereafter, also are exempt from union prohibitions. The Board declared that to be the case in *Tacoma Boatbuilding,* 277 NLRB 513 (1985) and *Tullus Gordon Construction,* 277 NLRB 530 (1985). In each, 8(b)(1)(A) violations were predicated upon enforcement of strike solidarity rules against union members who, before crossing the picket line, clearly communicated their intent to become financial core members. As here, at least in *Tacoma Boatbuilding,* the employees notified

the union that they were not resigning from membership, but as a "financial core member" they would not "henceforth, be subject to any obligations of membership other than that of paying uniformly required, dues and initiation fees. . . ." Since the Board held that such a letter was sufficient to establish financial core status, and further that such members could not lawfully be subjected to union discipline, these decisions, at least facially, appear to be dispositive.

Nonetheless, the Respondent would distinguish them because "they involve situations where there was no collective-bargaining agreement in effect." This argument is offered without articulation of just how this should alter the result. On the contrary, if financial core members are immune from discipline where their offensive conduct relates to renegotiation of an expired contract, surely, that protection is not lost where the strike is pursuant to a mid-term reopener. The coercive impact of union discipline upon Section 7 rights is the same in either case.[3]

Along this same line, the Respondent argues that the existence of a viable, presently enforceable union shop agreement tips the scales in its favor. It would seem, however, that such an agreement heightens the case for financial core immunity. The problem was addressed in *Tacoma, supra,* as follows:

> . . . [w]hen there is a union security clause in effect an employee must retain financial core status as a condition for employment. To then say, however,

---

3. In its post-hearing brief, the Respondent asserts that the union in *Tacoma, supra,* "contended that the . . . strike-beaking employees were not union members." While it is inconceivable that the union would have advanced that view, from my reading of *Tacoma,* I am convinced that the union argued there, as here, that the financial core letters were ineffective to support resignation, and hence, those who crossed the picket line remained members, subject to lawful application of internal union rules. 277 NLRB at 527-528.

> that a financial core member is subject to the same discipline as a full member is to render meaningless the third part of the *Scofield* test, namely, that a member is free to leave the union and escape the rule. (277 NLRB at p. 514).

In *Gordon Construction*, 277 NLRB at p. 531, the Board added:

> "Financial core membership permits an employee to maintain a dues-paying association with the union that will protect him against the threat of discharge under Section 8(a)(3) of the Act when the collective-bargaining agreement contains a union-security provision. . . . If the designation of financial core or dues paying only membership is to impart any significance then it must be recognized that it does not rise to the level of full membership for all purposes, but rather is a limited affiliation which excludes the employee from certain rights accorded to full members and also removes him from the reach of union fines.

More specifically, the union security argument is also rejected because irreconcilable with other well-settled statutory considerations. If sustained, Respondent's view in this regard would broaden the enforceable scope of the union shop clause, by approving it as an instrumentality for the indirect enforcement of nonfinancial union regulations. Thus, under the Respondent's contention, the union shop arrangement would limit the unwitting member to two choices; i.e. support the strike or resign from full membership and risk discharge. Obviously, the spectre of job loss inherent under the union shop arrangement would offer a forceful medium for compelling obedience. See e.g., *NLRB v. Pipefitters Local 120,* 719 F2d 178 (6th Cir. 1983). If striking members enjoy a statutorally protected right to

change their minds and return to work after communicating their resignations, that choice ought be exercisable free of such constraints. Indeed, the Act specifies that legitimate enforceability of union security agreements is confined to "the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . ." The financial core alternative adopted by the Board in *Tacoma* and *Gordon, supra,* has the salutary effect of both preserving the Section 7 rights of union members and precluding utilization of the union shop as a standing mechanism for assuring obedience to internal union rules.[4]

The Respondent further argues that the theory of the instant complaint interferes with the process of collective bargaining. In this respect, the Union contends that *Tacoma Boatbuilding* obliterates the distinction between union shop and agency shop agreements, thus diminishing the choices available in collective bargaining, while rendering meaningless the Union's successful negotiation of a union shop clause, a mandatory bargaining subject.[5] This contention overlooks the fact that, in this context, the distinction between agency and union shop is more technical than real. Neither sanctions the legitimate enforcement of nonfinancial union regulations. At the same time, the concept of financial core status does not prejudice the union shop's utility as a means of exacting financial obligations of all

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4. The respondent observes that financial core status rests upon a theory "where individuals may readily reap all of the benefits of Union membership and collective bargaining, and at the same time, avoid all the responsibilities." This observation, though valid, offers no basis for distinguishing *Tacoma.* The administrative law judge dismissed that case describing the authors of the financial core letters as "effectively seeking . . . . both to have their cake and eat it too." 277 NLRB at p. 5627. Thus the Board in reversing the judge was fully aware of this consequence.

5. *NLRB v. General Motors Corp.,* 373 U.S. 734 (1963).

members in the covered collective-bargaining unit. The Respondent may not expect more. Thus, as stated by the Supreme Court in *Pattern Makers, supra,* 119 LRRM at p. 2933:

> Under §8(a)(3), the only aspect of union membership that can be required pursuant to a union shop agreement is the payment of dues. (union security agreements cannot be used for "any purpose other than to compel payment of union dues and fees"). " 'Membership', as a condition of employment, is whittled down to its financial core."
>
> (under the Railway Labor Act, employees in a "union shop" cannot be compelled to pay dues to support certain union activities). Therefore, an employee required by a union security agreement to assume financial "membership" is not subject to union discipline. Such an employee is a "member" of the union only in the most limited sense. (citations omitted).

In sum, the Union has offered no material basis for concluding, on this record, that internal union interests ought take precedence over the Section 7 right of employees to refrain from strike action. Accordingly, on authority of *Tacoma Boatbuilding, supra,* and *Gordon Construction, supra,* it is concluded that Respondent violated Section 8(b)(1)(A) of the Act by rejecting resignations from full membership,[6] by processing charges against those who previously had declared unequivocally their intention to become financial core members,

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6. *Dick's Restaurant*, 287 NLRB No. 119, slip copy JD 12-13 (1988). *Tacoma* and *Gordon, supra,* in effect hold that the exercise of the employee's right to become a "financial core member" does not turn upon authorization or recognition of that status in a labor organization's constitution or bylaws. As in the case of full resignation, the option is reposed in the member, and the union may not limit that election by silence, any more than it could forbid such a change in status by adoption of a formal rule.

and by fining employees for conduct occurring after they had declared their intention to become financial core members.

Conclusions of Law

1. Elsinore Shore Associates, t/a Atlantis Casino Hotel, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent-Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to accept employee declarations that they intend to become financial core members, by processing internal union charges against employees for conduct subsequent to such declarations, and by fining said financial core members for subsequently crossing its picket line and returning to work, the Respondent-Union violated Section 8(b)(1)(A) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices having an effect upon commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent-Union has engaged in, and is engaging in certain unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act, it shall be recommended that it be ordered to cease and desist therefrom, and to take certain affirmative action necessary to effectuate the policies of the Act.

It shall be recommended further that the Respondent-Union be ordered to notify all employees in the collective-bargaining unit, in writing, that it recognizes financial core membership, and that the internal disciplinary charges filed, and the fines imposed against those who had declared such status have been rescinded. It shall be recommended further that any fines subsequently paid shall be refunded, with interest as

computed in *New Horizons for the Retarded, Inc.*, 283 NLRB No. 81 (1987).

Upon the entire record in this proceeding, including the findings of fact and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER

Respondent, Local 54, Hotel Employees & Restaurant Employees International Union, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Rejecting requests by members that they be placed on financial core status.

(b) Processing internal disciplinary charges against members for activities in which they engaged subsequent to their request for financial core membership.

(c) Imposing fines against members for activities in which they engaged as financial core members.

(d) In any like or related manner restraining or coercing employees in the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Rescind all charges and fines imposed upon employees for activities in which they engaged after their request for financial core membership and refund to them any sums they might have paid in consequence of Respondent's imposition of such fines as set forth in "The Remedy" section of this decision.

(b) Expunge from its records all references to the aforedescribed charges and fines and notify all employee-members in the appropriate collective-bargaining agreement that all fines have been rescinded, all records of charges expunged, and that financial core status henceforth shall be recognized as a permissible form of union membership.

(c) Post at its business offices and meeting halls copies of the appropriate attached notice marked "Appendix."[7] Copies thereof on forms provided by the Regional Director for Region 4, after being duly signed by Respondent's authorized representative shall be posted by the Respondent immediately upon receipt and maintained for 60-consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced or covered by any other material.

(d) Sign and return to the aforesaid Regional Director sufficient copies of the notices for posting by Elsinore Shore Associates t/a Atlantis Casino Hotel, if willing, at places where employee notices are customarily posted.

(e) Notify the Regional Director for Region 4 in writing within 20 days from the date of this

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7. In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Order what steps the Respondent has taken to comply herewith.

Dated at Washington, DC, August 8, 1988.

Joel A. Harmatz
Administrative Law Judge

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT decline any request by an employee that he or she wishes to resign from full union membership and become financial core members obligated only to tender periodic dues and uniformly applied fees.

WE WILL NOT process internal union charges against employees or fine them for activities in

which they have engaged after becoming financial core members obligated only to tender periodic dues and uniformly applied fees.

WE WILL NOT in any like or related manner coerce or restrain employees in the exercise of the rights outlined at the top of this notice.

WE WILL rescind all charges and fines imposed upon employee-members for conduct which occurred after they became financial core members, and WE WILL refund any such fines that they have paid, plus interest.

WE WILL expunge all references to the unlawful charges and fines from our records.

LOCAL 54, HOTEL EMPLOYEES & RESTAURANT EMPLOYEES INTERNATIONAL UNION AFL-CIO
(Atlantis Casino and Hotel)

_____
(Labor Organization)

Dated _____ By _____
(Representative)(Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 615 Chestnut Street, 7th Floor, Philadelphia, PA, 19102-4404, Telephone (215) 597-7643.

Supreme Court, U.S.
FILED
MAR 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1228

In the Supreme Court of the United States

OCTOBER TERM, 1989

LOCAL 54, HOTEL EMPLOYEES & RESTAURANT EMPLOYEES INTERNATIONAL UNION, AFL-CIO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether petitioner violated Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. 158 (b)(1)(A), when it imposed fines on union members who, during an economic strike, notified petitioner that they wished to change their status from full membership to financial core membership and then returned to work.

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In the Supreme Court of the United States

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NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A16) is reported at 887 F.2d 28. The decision and order of the National Labor Relations Board (Pet. App. A17-A21), affirming the decision of the administrative law judge (Pet. App. A22-A38), is reported at 291 N.L.R.B. No. 140.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1989. A petition for rehearing was denied on November 1, 1989 (Pet. App. A1). The petition for a writ of certiorari was filed on January 26, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, Local 54, Hotel Employees and Restaurant Employees International Union, AFL-CIO, and Elsinor Shore Associates T/A Atlantis Casino Hotel were parties to a collective bargaining agreement effective from September 1983 to September 1988. The agreement included a wage reopener clause and a union security provision, which required bargaining unit employees to join the union and remain members in order to retain their employment. In September 1987, in support of economic demands it had advanced in mid-term negotiations, petitioner commenced a strike and established a picket line. The unexpired agreement remained in force throughout the strike. Pet. App. A5, A24-A25.

During the strike, more than 100 bargaining unit employees crossed the picket line and returned to work. Pet. App. A5-A6. Before doing so, each sent the following letter to petitioner (*id.* at A6):

> I am an employee of Atlantis Casino Hotel in Atlantic City, New Jersey. This letter will serve as notification that I am changing my membership status in Local 54, Hotel Employee and Restaurant Employees (H.E.R.E.) International Union from that of a "full" member to that of a "financial core" member. As a "financial core" member, I will continue to pay to the union all

> initiation fees and dues uniformly required of all members [for] maintaining membership. I am not resigning from the union. I am only changing my membership status. I will not, henceforth, be subject to any obligations of membership other than that of paying uniformly required dues and initiation fees required of all Local 54 H.E.R.E. members.[1]

---

[1] Under Sections 8(a)(3) and 8(b)(2) of the Act, 29 U.S.C. 158(a)(3), 158(b)(2), it is an unfair labor practice for an employer or a union to discriminate against an employee in his employment "to encourage or discourage membership in any labor organization." However, under a proviso to Section 8(a)(3), an employer and a union are permitted to include a union security provision in their collective bargaining agreement—a provision requiring bargaining unit employees to become members of the union within 30 days of employment and to maintain membership as a condition of continued employment—provided that:

> no employer shall justify any discrimination against an employee for nonmembership in a labor organization * * * if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership * * *."

In *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963), the Court observed that under Section 8(a)(3), " '[m]embership' as a condition of employment is whittled down to its financial core." "[A]n employee required by a union security agreement to assume financial 'membership' is not subject to union discipline. Such an employee is a 'member' of the union only in the most limited sense." *Pattern Makers' League* v. *NLRB*, 473 U.S. 95, 106 n.16 (1985). See also *Communications Workers* v. *Beck*, 487 U.S. 735 (1988). In seeking "financial core" membership, therefore, the employees who crossed the picket line in this case sought to limit their membership in the union to those obligations enforceable consistent with Section 8(a)(3).

Before taking this step, these employees were full members of the union in good standing and were current in their obligation to pay dues. After returning to work, they continued to satisfy their financial obligations to petitioner. *Id.* at A6-A7, A25.

Under petitioner's constitution and bylaws, the timely payment of dues and initiation fees is the only condition for full membership. Neither petitioner's constitution and bylaws nor the collective bargaining agreement refers to any limited form of membership. Pet. App. A7, A25. Petitioner notified each of the nonstrikers that its constitution and bylaws contain no provision for "financial core" affiliation and that the "only level of affiliation which exists is that of a full member based on the payment of required dues and initiation fees." Each nonstriker was also advised that he or she was "still deemed to be a full member of this Union and accordingly bound by the terms and conditions of its By-laws and all obligations arising thereunder." *Id.* at A25-A26.

Thereafter, petitioner notified most of the nonstrikers that it was bringing intra-union charges against them because they had crossed the picket line. After notice and hearing, almost half were notified that they had been found guilty of the charges and fined in amounts ranging from $50 to $1500. Pet. App. A26.

2. The Board, affirming the decision of the administrative law judge, held that petitioner violated Section 8(b)(1)(A) of the NLRA, 29 U.S.C. 158(b)(1)(A), by rejecting resignations from full union membership, by processing charges against employees who "previously had declared unequivocally their intention to become financial core members," and by fining

them for conduct occurring after that declaration. Pet. App. A17-A18, A33-A34.[2]

The Board rejected petitioner's contention that *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967), established petitioner's right to impose discipline upon members who submitted "financial core" letters. The Board acknowledged that under *Allis-Chalmers* "a labor organization may lawfully invoke internal disciplinary machinery against full members, who remain in that capacity, while violating internal rules against strike-breaking." Pet. App. A28. However, the Board continued, subsequent decisions by this Court have manifested "a judicially approved concept of 'voluntarism,' whereby employees are given broad personal discretion to alter their membership and neutralize internal union restric-

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[2] Section 8(b) of the NLRA provides, in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> > (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *.

The rights of employees guaranteed by Section 7 of the Act, 29 U.S.C. 157, include:

> the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and * * * to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

tions." *Id.* at A29. The Board noted that in *Carpenters District Council for Seattle (Gordon Construction)*, 277 N.L.R.B. 530 (1985), and *Carpenters Local 470 (Tacoma Boatbuilding)*, 277 N.L.R.B. 513 (1985), it had held that under that policy of voluntarism, employees "who remain members [of a union], but declare financial core status, thereafter * * * are exempt from union prohibitions." Pet. App. A29. The Board found those decisions dispositive of this case.

The Board added that, under petitioner's view, "the union shop arrangement would limit the unwitting member to two choices; i.e. support the strike or resign from full membership and risk discharge," and that, if accepted, petitioner's view "would broaden the enforceable scope of the union shop clause by approving it as an instrumentality for the indirect enforcement of nonfinancial union regulations." Pet. App. A31.

3. The court of appeals enforced the Board's order. After reviewing the relevant decisions of this Court and the basis for the Board's decisions in *Tacoma Boatbuilding* and *Gordon Construction* (Pet. App. A10-A13), the panel approved the Board's position that employees subject to a union security provision must be allowed to assume financial core membership in a union. The court reasoned that "if striking members enjoy a statutorily protected right to change their minds and return to work after communicating their resignations, that choice ought to be, and is free of job loss constraints" (*id.* at A15). The court rejected petitioner's contention that "allowing financial core membership regardless of whether it is provided in the union shop agreement interferes with the process of collective bargaining." *Ibid.* The panel found that contention to be foreclosed by prin-

ciples recognized in this Court's cases (*id.* at A15-A16):

> First, the only aspect of union membership that can be required pursuant to a union shop agreement is the payment of dues. Second, membership as a condition of employment has been whittled down to its financial core. Third, a distinction exists between full membership and financial core membership. Fourth, an employee required by a union security agreement to assume financial core "membership" is not subject to union discipline.

ARGUMENT

Under Section 7 of the NLRA, 29 U.S.C. 157, employees have the right to engage in or refrain from concerted activities, including strikes, and it is generally an unfair labor practice for a union to restrain or coerce an employee in the exercise of that right, 29 U.S.C. 158(b)(1)(A); see *Pattern Makers' League* v. *NLRB*, 473 U.S. 95, 101 (1985). Although any form of union discipline for a refusal to participate in a strike could be said to restrain the exercise of the right not to strike, this Court has recognized that Section 8(b)(1)(A) does not foreclose all strike discipline. In *NLRB* v. *Allis-Chalmers Mfg. Co.*, *supra*, the Court held that Section 8(b)(1)(A) does not prohibit a union from disciplining employees who cross a picket line while they are full union members. See 388 U.S. at 196-197 & n.37.

As the Board and the court of appeals noted, however, this Court's subsequent decisions establish limits on a union's power to punish nonparticipation in a strike. In *NLRB* v. *Granite State Joint Bd., Textile Workers Union, Local 1029*, 409 U.S. 213

(1972), the Court held that a union could not discipline an employee who had resigned from the union before returning to work during a strike, where resignations were not prohibited by the union constitution. The Court explained that "[w]here a member lawfully resigns from a union and thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct." *Id.* at 217. Further, in *Pattern Makers*, the Court held that "a union is precluded from fining employees who have attempted to resign when resignations are prohibited by the union's constitution." 473 U.S. at 101. The Court explained that Section 8(b)(1)(A) of the Act does not authorize unions to restrict the right to resign and that enforcement of such restrictions would be "inconsistent with the policy of voluntary unionism implicit in § 8(a)(3)." 473 U.S. at 102-103, 104. In enacting that Section, the Court declared, "Congress * * * sought to eliminate completely any requirement that the employee maintain full union membership." *Id.* at 107. Thus, a union is free to enforce only "a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members *who are free to leave the union and escape the rule.*" *Scofield* v. *NLRB*, 394 U.S. 423, 430 (1969) (emphasis added).

Relying upon principles recognized in *Textile Workers*, *Scofield*, and *Pattern Makers*, the Board has held that the Act does not allow a union to impose discipline for nonparticipation in a strike on employees who first relinquish full membership in the union in favor of financial core membership. *Carpenters District Council for Seattle (Gordon Construction)*, *supra*; *Carpenters Local 470 (Tacoma Boat-*

building), supra. The Board adhered to that interpretation of the statute in this case—and also reaffirmed that a union may not deny core financial membership to those employees who wish to adopt it. See Pet. App. A29-A32.

Petitioner acknowledges implicitly that *Pattern Makers* allows an employee to avoid union discipline by resigning from a union altogether and that a union may not restrict the right to resign, but it argues that Section 8(b)(1)(A) of the Act permits a union to refuse to recognize financial core members who are immune from discipline. Pet. 9-10. Emphasizing that its members are free to resign (Pet. 5, 15), petitioner argues that *Allis-Chalmers* recognizes its "right to impose reasonable discipline on members who do not obey [union] rules." Pet. 11. As the Board has recognized, however, acceptance of this position would subject employees who are subject to a union security provision to a Hobson's choice. Employees would be forced to choose between full union membership, accompanied by exposure to union discipline, and possible loss of employment. The Board's refusal to require such a choice is entirely reasonable and consistent with this Court's decisions.[3]

The approach that the Board has fashioned for cases of this kind is a reasonable accommodation of Section 8(a)(3)'s limited authorization of union security clauses and of the policy of voluntary unionism, recognized in *Pattern Makers*, that this Section

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[3] In *Pattern Makers*, the resignations and subsequent refusals to honor the picket line occurred after the expiration of the collective bargaining agreement. 473 U.S. at 97. The Board has held that a union security provision in an expired agreement is not enforceable; thus, the employees who resigned from the union in *Pattern Makers* were not exposed to discharge on account of such a provision.

also embodies. Under Section 8(a)(3), a union and an employer are permitted to enter into a union security provision that requires membership in a union as a condition of employment, but enforcement of such a provision is permitted only in cases in which an employee has refused to comply with his obligation to pay union dues. As *Pattern Makers* noted, 473 U.S. at 107, Congress's intention in enacting this provision was "to eliminate completely any requirement that the employee maintain full union membership." If a union were free to refuse to recognize the limited form of membership contemplated by Section 8(a)(3), employees would be effectively compelled—contrary to *Pattern Makers*—to maintain full membership in order to avoid the possibility of discharge. Thus, the approach that the Board has followed in *Tacoma Boatbuilding*, *Gordon Construction*, and this case is a logical corollary of *Pattern Makers*.[4]

The Board's position does not interfere with the authority that Section 8(b)(1)(A) reserves to unions to prescribe rules "with respect to the acquisition or retention of membership therein." See Pet. 9-10. In *Pattern Makers*, the Court explained that the rules encompassed by this provision are "those that provide for the expulsion of employees from the union." 473 U.S. at 109. *Pattern Makers* also disposes of petitioner's related contention (Pet. 10) that the "disciplinary proceedings and penalties" that fol-

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[4] Indeed, as a practical matter, there is little difference in substance between resignation and adoption of financial core status. An employee who chooses that status is not subject to the burdens and does not enjoy the benefits of full union membership; he thus remains "a 'member' of the union only in the most limited sense." *Pattern Makers*, 473 U.S. at 106 n.16.

lowed petitioner's refusal to recognize "financial core" status were "internal proceedings and did not impact upon such members' employment rights vis-a-vis the employer." There, the Court rejected the argument that when "offending members are not discharged, but only fined" there is no interference "with workers' employment rights." 473 U.S. at 107. Moreover, as the Board found and the court of appeals agreed, the union's refusal to recognize financial core status did affect the nonstrikers' employment rights in this case because they risked job loss if they resigned their union membership.

Petitioner's additional contention (Pet. 11-12) that the decision below interferes with its ability to perform its collective bargaining responsibilities and deprives it of the fruits of collective bargaining is also without merit. Consistent with Section 8(a)(3), a union and an employer may not enforce a union security clause that requires any obligation other than financial support. *General Motors Corp.*, 373 U.S. at 742; see note 1, *supra*.[5]

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[5] Petitioner's reliance (Pet. 11, 14) on *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967), is misplaced. In that case, the employees who were disciplined had elected to acquire and retain "full union membership," 388 U.S. at 196, and the Court expressly reserved the question whether discipline could be imposed "on members whose membership was in fact limited to the obligation of paying monthly dues," *id.* at 197. See *NLRB* v. *Granite State Joint Bd., Textile Workers Union, Local 1029*, 409 U.S. 213, 215 (1972).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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